PATENT

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In the Matter of the Application of:	VAN DEN HUEVEL et al.	Confirmation No. 1143
Serial No.:	10/537,027	Group Art Unit: 2857
Filed:	January 5, 2006	Examiner: WEST, Jeffrey R.
Entitled:	CLINICAL ASSISTANT FOR COCHLEAR IMPLANT CARE	
Docket No.:	62367-392843	

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APPEAL BRIEF PURSUANT TO 37 C.F.R. § 41.37

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I. REAL PARTY IN INTEREST

The real party in interest is Cochlear Limited, which derives its rights in this application by virtue of assignment of the application to Cochlear Limited.

II. RELATED APPEALS AND INTERFERENCES

There are currently no appeals or interferences known to the Appellants, the Appellants' legal representative, or the assignee that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 139, 140, 144-146, 150, 153, 155-159, 162, 164-168, 171 and 173-187 are currently pending in the present application. Claims 1-138, 141-143, 147-149, 151, 152, 154, 160, 161, 163, 169, 170 and 172 were previously canceled. Claims 139, 140, 144-146, 150, 153, 155-159, 162, 164-168, 171 and 173-187 were finally rejected and are the subject of this appeal.

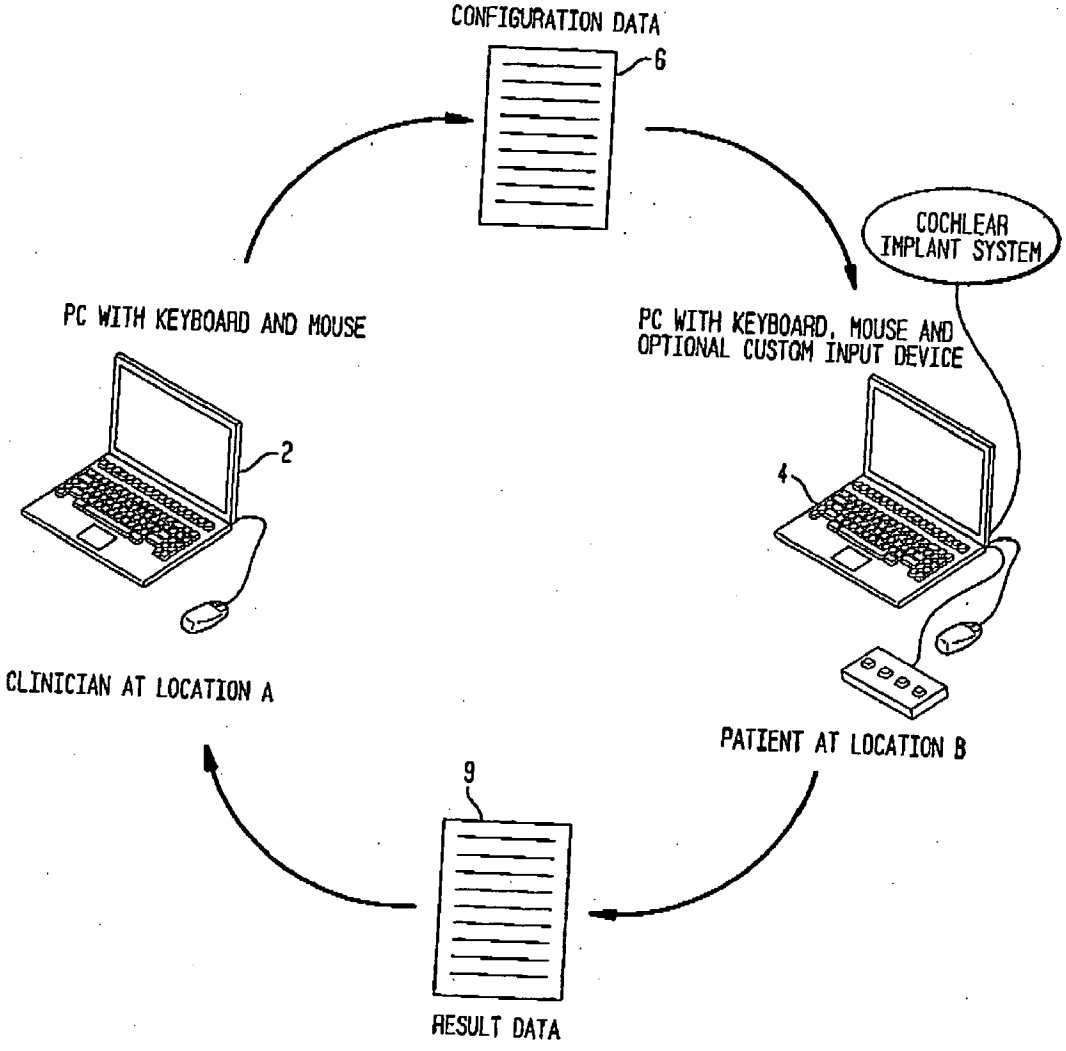
IV. STATUS OF AMENDMENTS

All Amendments have been entered.

V. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 139 is directed to a system for performing after-care of a recipient of a cochlear implant. (*See*, independent claim 139; Appellants' pg. 5, lns. 31-33; pg. 10, ln. 22; pg. 17, lns. 26-28; pg. 18, lns. 21-24; Appellants' FIG. 1, reproduced below.)

FIG. 1



Appellant's FIG. 1

The system includes a clinician subsystem 2 having a clinician interface configured to receive clinician inputs, and to select and/or customize a series of cochlear implant after-care tests in response to the clinician inputs. (*See*, independent claim 139; Appellants' specification pg. 18, lns. 22-24; pg. 19, lns. 4-12; pg. 22, lns. 12-20; Appellants' FIGS. 1 and 4.) The system also includes a recipient subsystem 4 configured to receive the after-care tests from the clinician subsystem, and to perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs. (*See*, independent claim 139; Appellants' specification pg. 13, lns. 13-16; pg. 18, lns. 22-24; pg. 19, lns. 4-15 and 22-28; pg. 23, lns. 30-36; pg. 26, ln. 6 – pg. 27, ln. 9; Appellants' FIGS. 7-14.) Additionally, the recipient subsystem 4 is configured to generate result data indicative of the result of the after-care tests for subsequent use by said clinician subsystem, and the clinician subsystem is further configured to receive the result data from said recipient subsystem. (*See*, independent claim 139; Appellants' specification pg. 15, lns. 22-24; pg. 24, lns. 1-3.)

Dependent claim 177 recites that one of the series of cochlear implant after-care tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly. (*See*, dependent claim 177; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 4; pg. 26, lns. 12-29; FIGS. 8-10.) Dependent claim 179 recites that the cochlear implant comprises a plurality of electrodes, and that one of the series of after-care tests determines whether the dynamic range of each of the plurality of electrodes is set correctly. (*See*, dependent claim 179; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 9; pg. 26, lns. 12-29.)

Independent claim 156 is directed to a method for performing after-care of a recipient of a cochlear implant. (*See*, independent claim 156; Appellants' specification pg. 7, lns. 16-17; pg.

10, ln. 22; pg. 17, lns. 26-28.) The method includes receiving inputs at a clinician interface and performing selection and/or customization of a series of cochlear implant after-care tests in response to the clinician inputs. (*See*, independent claim 156; Appellants' specification pg. 19, lns. 4-12; pg. 22, lns. 12-20; Appellants' FIGS. 1 and 4.) The method also includes delivering the after-care tests to a recipient subsystem 4 and performing the series of after-care tests with the recipient subsystem 4, in response to a series of recipient inputs, substantially independent of the clinician subsystem 2 to generate result data indicative of the result of the after-care tests. (*See*, independent claim 156; Appellants' specification pg. 13, lns. 13-18; pg. 19, lns. 22-28; pg. 23, ln. 30 – pg. 24, ln. 3; pg. 26, ln. 9 – pg. 27, ln. 9; Appellants' FIGS. 1 and 7-14.) The method further includes delivering the result data to the clinician subsystem 2. (*See*, independent claim 156; Appellants' specification pg. 15, lns. 22-24; pg. 24, lns. 1-3.)

Dependent claim 181 recites that a least one of the series of after-care tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly. (*See*, dependent claim 181; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 4; pg. 26, lns. 12-29; FIGS. 8-10.) Dependent claim 182 recites that the cochlear implant comprises a plurality of electrodes, and that at least a second one of the series of after-care tests is a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly. (*See*, dependent claim 182; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 9; pg. 26, lns. 12-29.)

Independent claim 165 is directed to a non-transitory computer readable medium comprising computer code instructions which, when executed by a computer system 100, implement a method of performing after-care of a recipient of a cochlear implant. (*See*, independent claim 165; Appellants' specification pg. 5, lns. 31-33; pg. 10, ln. 22; pg. 17, lns. 26-

28; pg. 20, lns. 1-20; pg. 21, lns. 13-30; FIG. 1A.) The method implemented includes receiving inputs at a clinician interface and performing selection and/or customization of a series of cochlear implant after-care tests in response to the clinician inputs. (*See*, independent claim 165; Appellants' specification pg. 19, lns. 4-12; pg. 22, lns. 12-20; Appellants' FIGS. 1 and 4.) The method implemented also includes delivering the after-care tests to a recipient subsystem 4 comprising a recipient interface and performing the series of after-care tests with the recipient subsystem 4, in response to a series of recipient inputs, substantially independent of a clinician subsystem 2 to generate result data indicative of the result of the after-care tests. (*See*, independent claim 165; Appellants' specification pg. 13, lns. 13-18; pg. 19, lns. 22-28; pg. 23, ln. 30 - pg. 24, ln. 3; pg. 26, ln. 6 – pg. 27, ln. 9; Appellants' FIGS. 1 and 7-14.) The method implemented further includes delivering the result data to the clinician subsystem 2. (*See*, independent claim 165; Appellants' specification pg. 15, lns. 22-24; pg. 24, lns. 1-3.)

Dependent claim 184 recites that a least one of the series of cochlear implant tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly. (*See*, dependent claim 184; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 4; pg. 26, lns. 12-29; FIGS. 8-10.) Dependent claim 185 recites that the cochlear implant comprises a plurality of electrodes, and that at least a second one of the series of after-care tests is a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly. (*See*, dependent claim 185; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 9; pg. 26, lns. 12-29.)

Independent claim 174 is directed to a system for performing after-care of a recipient of a cochlear implant. (*See*, independent claim 174; Appellants' specification pg. 5, lns. 31-33; pg.

10, ln. 22; pg. 17, lns. 26-28; pg. 18, lns. 21-24; Appellants' FIG. 1.) The system includes means 118, 120 for receiving one or more clinician inputs via a clinician subsystem 2. (*See*, independent claim 174; Appellants' specification pg. 18, lns. 22-24; pg. 19, lns. 4-7; pg. 20, lns. 19-20; pg. 21, lns. 4-7 (as amended); Appellants' FIGS. 1 and 1A.) The system also includes means 2 for selecting and customizing a series of cochlear implant after-care tests in response to the clinician inputs. (*See*, independent claim 174; Appellants' specification pg. 18, lns. 22-24; pg. 19, lns. 4-12; pg. 22, lns. 12-20; Appellants' FIGS. 1 and 4.)

The system of claim 174 also includes means 108c, 130 for delivering said series of after-care tests to a recipient subsystem 4. (*See*, independent claim 174; Appellants' specification pg. 18, lns. 22-26; pg. 19, lns. 5-8; pg. 20, lns. 22-27; Appellants' FIGS. 1 and 1A.) The system further includes means 118, 120 for receiving recipient inputs via the recipient subsystem 4. (*See*, independent claim 174; Appellants' specification pg. 18, lns. 22-24; pg. 19, lns. 13-15; pg. 20, lns. 19-20; pg. 21, lns. 4-7 (as amended); Appellants' FIGS. 1 and 1A.) The system still further includes means for proceeding through the series of after-care tests with said recipient subsystem 4, in response to a series of recipient inputs, substantially independent of the clinician subsystem 2 to generate result data indicative of the result of the after-care tests. (*See*, independent claim 174; Appellants' specification pg. 13, lns. 13-18; pg. 19, lns. 22-28; pg. 23, lns. 30-36; pg. 26, lns. 6-8; Appellants' FIGS. 7-14.) Additionally, the system includes means 108c, 130 for delivering the result data to the clinician subsystem 2. (*See*, independent claim 174; Appellants' specification pg. 18, lns. 22-26; pg. 19, lns. 29-31; pg. 20, lns. 22-27; Appellants' FIGS. 1 and 1A.)

Dependent claim 186 recites that the series of after-care tests includes a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant

are operating correctly. (*See*, dependent claim 186; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 4; pg. 26, lns. 12-29; FIGS. 8-10.) Dependent claim 187 recites that the cochlear implant comprises a plurality of electrodes, and that the series of after-care tests further includes a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly. (*See*, dependent claim 187; Appellants' specification pg. 10, lns. 22 and 28-31; pg. 22, ln. 35 – pg. 23, ln. 9; pg. 26, lns. 12-29.)

VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

A. Whether the Examiner improperly rejected independent claims 139, 156, 165 and 174, and dependent claims 140, 144, 150, 156, 159, 162, 164, 168, 171 and 173 under 35 U.S.C. 102(e) as anticipated by U.S. Patent No. 6,916,291 to Givens et al. (hereinafter, "Givens"); and whether the Examiner improperly rejected dependent claims 145, 146, 153, 157, 158, 166, 167 and 175-187 under 35 U.S.C. 103(a) as unpatentable over Givens in view of U.S. Patent No. 5,626,629 to Faltys et al. (hereinafter, "Faltys").

B. Whether the Examiner improperly rejected dependent claims 179, 182, 185 and 187 under 35 U.S.C. 103(a) as unpatentable over Givens in view of Faltys.

VII. ARGUMENT

A. Rejection under 35 U.S.C. 102(e) over Givens

Claims 139, 140, 144, 145, 146, 150, 153, 155 and 177-180

As noted above, independent claim 139 has been rejected under 35 U.S.C. 102(e) as being anticipated by Givens. Specifically, in the final Office Action issued November 29, 2010, (hereinafter, the "November 2010 Office Action"), the Examiner asserted that Givens discloses that a "recipient/patient steps through the series of tests by using a user interface to indicate that a particular test tone is heard at which time the series proceeds to the next test tone," and concluded that "[a]s such, the series of after-care tests . . . are performed, substantially independent of the clinician subsystem, in response to recipient inputs." (*See*, November 2010 Office Action, pg. 15.) In response, Appellants submitted arguments demonstrating that the system of Givens was not configured to "perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs." (*See*, Applicant's Response submitted January 31, 2011 (hereinafter, the "January 2011 Response")).

In the Advisory Action issued February 16, 2011 (hereinafter, the "Advisory Action"), the Examiner maintained the rejection of claim 139 under 35 U.S.C. 102(e) as being anticipated by Givens. As is well known, "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." (*See*, Manual of Patent Examining Procedure (MPEP) §2131 (citing *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987))). Moreover, "***[t]he identical invention must be shown in as complete detail as is contained in the . . . claim***." (*See*, MPEP §2131 (citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9

USPQ2d 1913, 1920 (Fed. Cir. 1989)); emphasis added.) Appellants assert that Givens fails to expressly or inherently disclose a system that is able "to perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs," as recited in claim 139.

November 2010 Office Action

Givens is directed to clinician implemented methods to remotely assess and certify the hearing loss of a patient according to standardized guidelines. (*See*, Givens, col. 2, lns. 18-56.) In Givens, the tests "use a computer network to allow interaction between a test administration site and one or a plurality of remote ('local') patient sites." (*See*, Givens, col. 8, lns. 57-61.) In particular, the "test is relayed from the test administration site to a desired patient or local site through the use of a computer network." (*See*, Givens, col. 8, ln. 63- col. 9, ln. 15.) The tests are then administered by the clinician in a manner that allows "interaction . . . between the user [patient] and the clinician during at least a portion of administration of the test." (*See*, Givens, col. 9, lns. 15-20.)

In the November 2010 Office Action, the Examiner asserted that Givens discloses a system in which "[t]he recipient/patient steps through the series of tests by using a user interface to indicate that a particular test tone is heard at which time the series proceeds to the next test tone." (*See*, Office Action, pg. 15, citing columns 12, 14 and 15 of Givens.) To support this assertion, the Examiner relied upon portions of columns 12, 14 and 15 of Givens. However, Appellants assert that Givens fails to disclose that which is asserted by the Examiner.

More specifically, in the portions of column 15 relied upon by the Examiner, Givens

discloses that "[w]hen the test sequence and tone are output, the patient indicates when a test tone is audible." (*See*, Givens, col. 15, lns. 8-10.) In response to the indication, a "processor . . . generates and/or selects a web page 70c *to be served to a client at the test administration site 10*." (*See*, Givens, col. 15, lns.10-13; emphasis added.) The web page "may be served to the test administration site 10 by the local device 50, 50' *to allow control of the local device* 50, 50'." (*See*, Givens, col. 15, lns. 59-61; emphasis added.) More specifically, the web page "may be provided from the server of the local device 50, 50' to a client . . . at the test administration site 10 and includes *test control parameters which can be activated and/or adjusted by the clinician during the test*." (*See*, Givens, col. 15, lns. 62-66; emphasis added.)

As noted above, the client "at the test administration site" is a clinician remote from the recipient. Accordingly, the portions of Givens quoted above disclose generating a web page that enables a clinician at a remote test administration site to control the test in response to recipient input. That is, the clinician is controlling the test in response to the recipient's indication of when a tone is audible. Appellants submit that the equipment that performs such clinician controlled testing is not "a recipient subsystem configured to . . . communicate with the cochlear implant and to perform the series of after-care tests, ***substantially independent*** of the clinician subsystem, in response to a series of recipient inputs," as recited in Applicants' claim 139. (Emphasis added.) In particular, Appellants submit that Givens fails to disclose performing multiple portions of a single test, much less performing a series of different tests, substantially independent of the test administration site, in response to a series of recipient inputs. Rather, Appellants submit that Givens' local device continually prompts the test administration site to control a hearing test performed by the local device.

In addition, the portion of column 14 of Givens cited by the Examiner discloses that "the

data processing system 70 receives commands *from the clinician at the test administration site 10 and controls* the function generator 56 and attenuator 57 to output the desired test sequence and tone . . . to the client or patient," and the cited portion of column 12 of Givens discloses tone output and recipient input devices. (*See*, Givens, col. 14, lns. 48-52 and col. 12, lns. 38-54.) As such, Appellants submit that the portions of columns 12 and 14 of Givens relied upon by the Examiner do not cure the above-noted deficiencies of column 15 of Givens.

Advisory Action

In the January 2011 Response, Appellants submitted arguments similar to those discussed above. In response, the Examiner maintained the rejection of claim 139 under 35 U.S.C. 102(e), relying in part on newly-cited portions of Givens. (*See*, Advisory Action, pg. 2.) More specifically, in the Advisory Action, the Examiner asserted that Givens discloses that "in response to a series of recipient inputs, the test sequence steps through a series of tones and relays information back to the local processor 70p which generates information about the test to be served to a client at the test administration site," citing column 14, lines 57-59 and column 15, lines 8-19 of Givens as support. (*See*, Advisory Action, pg. 2.) Appellants submit that this cited portion of column 14 of Givens does not cure the above noted deficiencies of Givens, but rather merely discloses that information about a test may be provided "to test administration site 10 as web pages 70c which may be predefined and stored at the local device." (*See*, Givens, col. 14, lns. 57-59.) Moreover, the cited portion of column 15 discloses that "[w]hen the test sequence and tone are output, the patient indicates when a test tone is audible," and, in response to the indication, a "processor . . . generates and/or selects a web page 70c *to be served to a client at the test administration site 10*." (*See*, Givens, col. 15, lns. 8-13; emphasis added.) The web page "reflect[s] the activation of the input switch," and, as noted above, such a web page "may be

served to the test administration site 10 by the local device 50, 50' *to allow control of the local device* 50, 50'." (*See*, Givens, col. 15, lns. 18-19 and 59-61; emphasis added.) Accordingly, Appellants submit that the above portions of Givens disclose continually prompting a remote test administration site to control a hearing test performed by a local device, and not "a recipient subsystem configured to . . . communicate with the cochlear implant and to perform the series of after-care tests, ***substantially independent*** of the clinician subsystem, in response to a series of recipient inputs," as recited in Applicants' claim 139. (Emphasis added.)

As noted above, the Examiner asserted that Givens discloses that "in response to a series of recipient inputs, the test sequence steps through a series of tones and relays information back to the local processor." (*See*, Advisory Action, pg. 2.) While Givens uses the term "test sequence," Appellants submit that Givens fails to disclose, either expressly or inherently, a system configured to step through a sequence of tones in response to a series of recipient inputs "substantially independent" of the test administration site. (*See*, Appellants' claim 139.) Rather, as noted above, Givens discloses communicating with the test administration site when a patient indicates that a test tone is audible. (*See*, Givens, col. 15, lns. 8-13.) Additionally, Givens discloses that "the test sequence and auditory hearing assessment tones *may be controlled from the remote administration site* and the tones generated locally," and that "[e]mbodiments of the present invention may also allow *the test administrator* (typically an audiologist) *to adjust the test sequence or tone based on the patient's indicated response*." (*See*, Givens, col. 2, lns. 48-54.) Similarly, "[p]atient input or responses may also be accepted during the test and the associated data *transmitted back to the administration site*." (*See*, Givens, col. 2, lns. 54-56.) Accordingly, Givens discloses providing recipient inputs to a test administration site capable of controlling the test sequence, rather than "a recipient subsystem configured to . . . perform the

series of after-care tests, ***substantially independent*** of the clinician subsystem, in response to a series of recipient inputs," as recited in Applicants' claim 139. (Emphasis added.)

In the Advisory Action, the Examiner asserted that "column 14, lines 39-56 of Givens indicates that the 'local device 50' (i.e. recipient subsystem) communicates with the cochlear implant to perform the test sequence in response to initiation by the clinician." (*See*, Advisory Action, pg. 2.) The portion of column 14 cited by the Examiner discloses that Givens' data processing system may be a web server, and "receives commands from the clinician at the test administration site 10 and controls the function generator 56 and attenuator 57 to output the desired test sequence and tone . . . to the client or patient." (*See*, Givens, col. 14, lns. 39-41 and 48-52.) As such, Givens' "test sequence and tone" is output under the control of the remote test administration site, and not "substantially independent of the clinician subsystem, in response to a series of recipient inputs," as recited in Applicants' claim 139.

In the Advisory Action, the Examiner also alleged that "Givens discloses the performance of a series of different tests by disclosing, inter alia, the performance [of] a first test sequence for one ear and a second tests sequence for a second ear," citing column 14, lines 48-56 and column 19, lines 34-40 as support. (*See*, Advisory Action, pg. 2.) However, the cited portion of column 19 discloses that "remote expert site 10" is able to control the "change from one ear to the other," while the cited portion of column 14 discloses that the remote test administration site controls the output of the test sequence and tone to the patient. (*See*, Givens, col. 19, lns. 35-39, and col. 14, lns. 48-52.) As such, Appellants submit that Givens discloses that the remote test administration site is able to switch between tests, and not that a local device is able to "perform the series of after-care tests, ***substantially independent*** of the clinician subsystem, in response to a series of recipient inputs," as recited in Applicants' claim 139.

(Emphasis added.)

The Examiner further asserts in the Advisory Action that "interacting with the clinician subsystem to initiate and/or select the tests to be performed at the recipient subsystem does not mean that performance of the series of after-care tests is not 'substantially independent' of the clinician subsystem." (*See*, Advisory Action, pg. 2.) The Examiner relies upon Appellants' claim 155 and an exemplary embodiment described in relation to FIG. 2 of Appellants' specification as support for this assertion. (*See*, Advisory Action, pg. 2.) Appellants do not acquiesce to the Examiner's characterization of the cited portions of Appellants' application. However, regardless of whether the Examiner's assertion is true, Appellants submit that Givens fails to disclose any "***series*** of after-care tests" that, after being selected or initiated, is performed by a local device both "***substantially independent*** of the clinician subsystem," and "***in response to a series of recipient inputs***." (*See*, Applicants' claim 139; emphasis added.) Rather, as noted above, Givens discloses providing a recipient response to a test administration site capable of controlling a test performed by a local device. (*See*, Givens, col. 15, lns. 8-13 and 59-61.)

Therefore, because Givens fails to expressly or inherently disclose "a recipient subsystem configured to . . . communicate with the cochlear implant and to perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs," Appellants assert that Givens does not disclose the identical invention as recited in claim 139. As such, Appellants submit that the rejection of claim 139 under 35 U.S.C. 102(e) as being anticipated by Givens is improper and should be reversed.

Claims 156-159, 162, 164 and 181-183

As noted above, independent claim 156 has been rejected under 35 U.S.C. 102(e) as being anticipated by Givens. Claim 156 is directed to is directed to a "method for performing

after-care of a recipient of a cochlear implant." (*See*, Appellants' claim 156.) The method comprises "performing the series after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem." (*See*, Appellants' claim 156.) For at least the reasons discussed above with reference to claim 139, Appellants respectfully assert that Givens fails to disclose at least these elements of claim 156. Rather, as noted above, Givens discloses providing a recipient response to a test administration site capable of controlling a test performed by a local device. (*See*, Givens, col. 15, lns. 8-13 and 59-61.)

Therefore, because Givens fails to expressly or inherently disclose "performing the series after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem," Appellants assert that Givens does not disclose the identical invention as recited in claim 156. As such, Appellants submit that the rejection of claim 156 under 35 U.S.C. 102(e) as being anticipated by Givens is improper and should be reversed.

Claims 165-168, 171, 173, 184 and 185

As noted above, independent claim 165 has been rejected under 35 U.S.C. 102(e) as being anticipated by Givens. Claim 165 is directed to a "non-transitory computer readable medium comprising computer code instructions which, when executed by a computer system implement a method of performing after-care of a recipient of a cochlear implant." (*See*, Appellants' claim 165.) The method comprises "performing the series of after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem." (*See*, Applicants' claim 165, above.) For at least the reasons discussed above with reference to claim 139, Appellants respectfully assert that Givens fails to disclose at

least these elements of claim 165. Rather, as noted above, Givens discloses providing a recipient response to a test administration site capable of controlling a test performed by a local device. (*See*, Givens, col. 15, lns. 8-13 and 59-61.)

Therefore, because Givens fails to expressly or inherently disclose "performing the series after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem," Appellants assert that Givens does not disclose the identical invention as recited in claim 165. As such, Appellants submit that the rejection of claim 165 under 35 U.S.C. 102(e) as being anticipated by Givens is improper and should be reversed.

Claims 174-176, 186 and 187

As noted above, independent claim 174 has been rejected under 35 U.S.C. 102(e) as being anticipated by Givens. Claim 174 is directed to a "system for performing after-care of a recipient of a cochlear implant." (*See*, Appellants' claim 174.) The system comprises "means for proceeding through the series of after-care tests with said recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem." (*See*, Appellants' claim 174.) For at least the reasons discussed above with reference to claim 139, Appellants respectfully assert that Givens fails to disclose at least these elements of claim 174. Rather, as noted above, Givens discloses providing a recipient response to a test administration site capable of controlling a test performed by a local device. (*See*, Givens, col. 15, lns. 8-13 and 59-61.)

Therefore, because Givens fails to expressly or inherently disclose "means for proceeding through the series of after-care tests with said recipient subsystem, in response to a series of

recipient inputs, substantially independent of the clinician subsystem," Appellants assert that Givens does not disclose the identical invention as recited in claim 174. As such, Appellants submit that the rejection of claim 174 under 35 U.S.C. 102(e) as being anticipated by Givens is improper and should be reversed.

B. Rejection under 35 U.S.C. 103(a) over Givens in view of Faltys

Claim 179

As noted above, Appellants' independent claim 139 recites, in part, "a recipient subsystem configured to . . . perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs." Claims 177 and 179, which depend from claim 139, further define the claimed series of after-care tests. In particular, claim 177, which depends from claim 139, recites that "one of the series of cochlear implant after-care tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly." (*See*, Appellants' claim 177.) Claim 179, which depends from claim 177, recites "wherein the cochlear implant comprises a plurality of electrodes, and wherein one of the series of after-care tests determines whether the dynamic range of each of the plurality of electrodes is set correctly." (*See*, Appellants' claim 179.) Accordingly, in claim 179, the series of cochlear implant after-care tests of claim 139 is further limited to include at least two substantially different types of after-care tests.

As noted above, dependent claim 179 has been rejected under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys. Specifically, in the November 2010 Office Action, the Examiner asserted that "while Givens teaches performing a plurality of after-care tests . . . Given[s] is not explicit in specifying that at least one of the one or more after care tests

comprises a cochlear implant integrity check" or a test that "determines whether the dynamic range of each of a plurality of electrodes is set correctly." (*See*, November 2010 Office Action, pg. 8.) In the November 2010 Office Action, the Examiner relied secondarily upon Faltys in attempting to cure the deficiencies of Givens, asserting that "Faltys further teaches wherein at least one of the one or more after-care tests comprises a cochlear implant integrity check," and another "determines whether the dynamic range of each of a plurality of electrodes is set correctly." (*See*, November 2010 Office Action, pg. 9.) In response, Appellants submitted arguments demonstrating that Faltys fail to disclose that which is missing from Givens, and particularly "a recipient subsystem configured to . . . perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs," as recited in claim 139, from which claim 179 depends. (*See*, January 2011 Response.) Appellants also submitted arguments demonstrating that Givens and Faltys fail to anticipate or render obvious these features as further limited by claims 177 and 179 such that the series of after-care tests includes two substantially different types of after-care tests, as described above.

In the Advisory Action, the Examiner maintained the rejection of claim 179, asserting that Givens anticipates the above-quoted features of claim 139, and that "Faltys is only relied upon to modify Givens to explicitly specify that at least one of the one or more after-care tests comprises a cochlear implant integrity check, determines whether the dynamic range of each of a plurality of electrodes is set correctly . . . ." (*See*, Advisory Action, pg. 2.) As detailed below, Appellants assert that the Examiner's continued rejection of claim 179 under 35 U.S.C. 103(a) over Givens and Faltys is improper and should be reversed.

Faltys is directed to a system for fitting or programming a cochlear stimulation system for a patient utilizing objective measurements rather than subjective feedback. (*See*, Faltys, col. 3,

lns. 29-47.) In Faltys, the clinician utilizes the fitting system to instruct the cochlear implant system to deliver an electrical stimulation signal to the patient. (*See*, Faltys, col. 5, ln. 52-col. 6, ln. 42; and col. 15, lns. 19-56.) The fitting system records an objective measurement of the patient's response to the stimulation. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23.) Based on the objective measurement, the clinician adjusts the stimulation provided. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23; and col. 15, lns. 52-56.) This procedure is iteratively repeated to determine a patient's threshold and comfort levels. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23; col. 15, lns. 52-56; and col. 16, lns. 19-23.) In other words, in the system of Faltys, a clinician operates the tests, evaluates objective feedback and adjusts stimulation signals applied to the patient. (*See*, Faltys, col. 6, lns. 32- col. 8, ln. 23; and col. 15, lns. 19-56.) Due to this large amount of clinician involvement, Applicants submit that Faltys fails to disclose any local device that enables a patient to proceed through a series of after-care tests, via the patient's input to the local device, substantially independent of a remote site. As such, Appellants submit that Faltys fails to cure the above-noted deficiencies of Givens.

Accordingly, Appellants submit that Givens and Faltys, individually and in combination, fail to disclose "a recipient subsystem configured to . . . perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs," as recited in claim 139. For similar reasons, Appellants submit that Givens and Faltys also fail to anticipate or render obvious performing a series of after-care tests, including at least two different types of after-care tests, "substantially independent of the clinician subsystem, in response to a series of recipient inputs," as claim 139 is further limited by claims 177 and 179. (*See*, Applicants' claims 139, 177 and 179.) Regardless of whether Faltys recites the particular tests recited in claims 177 and 179, Appellants submit that Faltys and Givens fail to anticipate or render obvious the performance of a series of after-care tests, including the recited tests, "substantially independent of the clinician subsystem, in response to a series of recipient inputs." As such, Appellants submit that the rejection of claim 179 under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys is improper and should be reversed.

Claim 182

As noted above, Appellants' independent claim 156 recites, in part, "performing the series after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem." (*See*, Appellants' claim 156.) Claims 181 and 182, which depend from claim 156, further define the claimed series of after-care tests. In particular, claim 181, which depends from claim 156, recites that "at least one of the series of after-care tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly." (*See*, Appellants' claim 181.) Claim 182, which depends from claim 181, recites "wherein the cochlear implant comprises a plurality of electrodes, and wherein at least a second one of the series of after-care tests is a test

that determines whether the dynamic range of each of the plurality of electrodes is set correctly." (*See*, Appellants' claim 182.) Accordingly, in claim 182, the series of cochlear implant after-care tests of claim 156 is further limited to include at least two substantially different types of after-care tests.

As noted above, dependent claim 182 has been rejected under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys. For at least the reasons discussed above with reference to claim 179, Appellants submit that Givens and Faltys also fail to anticipate or render obvious performing a series of after-care tests, including at least two different types of after-care tests, "substantially independent of the clinician subsystem, in response to a series of recipient inputs," regardless of whether Faltys recites the particular tests recited in claims 181 and 182. (*See*, Applicants' claims 156, 181 and 182.) As such, Appellants submit that the rejection of claim 182 under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys is improper and should be reversed.

Claim 185

As noted above, Appellants' independent claim 165 recites, in part, "performing the series of after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem." (*See*, Appellants' claim 165.) Claims 184 and 185, which depend from claim 165, further define the claimed series of after-care tests. In particular, claim 184, which depends from claim 165, recites that "at least one of the series of cochlear implant tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly." (*See*, Appellants' claim 184.) Claim 185, which depends from claim 184, recites "wherein the cochlear implant comprises a plurality of electrodes, and wherein at least a second one of the series of after-care

tests is a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly." (*See*, Appellants' claim 185.) Accordingly, in claim 185, the series of cochlear implant after-care tests of claim 165 is further limited to include at least two substantially different types of after-care tests.

As noted above, dependent claim 185 has been rejected under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys. For at least the reasons discussed above with reference to claim 179, Appellants submit that Givens and Faltys also fail to anticipate or render obvious performing a series of after-care tests, including at least two different types of after-care tests, "substantially independent of the clinician subsystem, in response to a series of recipient inputs," regardless of whether Faltys recites the particular tests recited in claims 184 and 185. (*See*, Applicants' claims 165, 184 and 185.) As such, Appellants submit that the rejection of claim 185 under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys is improper and should be reversed.

Claim 187

As noted above, Appellants' independent claim 174 recites, in part, "means for proceeding through the series of after-care tests with said recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem." (*See*, Appellants' claim 174.) Claims 186 and 187, which depend from claim 174, further define the claimed series of after-care tests. In particular, claim 186, which depends from claim 174, recites that "the series of after-care tests includes a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly." (*See*, Appellants' claim 186.) Claim 187, which depends from claim 186, recites "wherein the cochlear implant comprises a plurality of electrodes, and wherein the series of after-care tests

further includes a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly." (*See*, Appellants' claim 187.) Accordingly, in claim 187, the series of cochlear implant after-care tests of claim 174 is further limited to include at least two substantially different types of after-care tests.

As noted above, dependent claim 187 has been rejected under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys. For at least the reasons discussed above with reference to claim 179, Appellants submit that Givens and Faltys also fail to anticipate or render obvious performing a series of after-care tests, including at least two different types of after-care tests, "substantially independent of the clinician subsystem, in response to a series of recipient inputs," regardless of whether Faltys recites the particular tests recited in claims 186 and 187. (*See*, Applicants' claims 174, 186 and 187.) As such, Appellants submit that the rejection of claim 187 under 35 U.S.C. 103(a) as being unpatentable over Givens in view of Faltys is improper and should be reversed.

VIII. CONCLUSION

For the reasons noted above, Appellants submit that the pending claims define patentable subject matter. Accordingly, Appellants request that the Examiner's rejection of these claims be reversed and that the pending application be passed to issue.

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Respectfully submitted,

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CLAIMS APPENDIX

1-138. (Cancelled)

139. A system for performing after-care of a recipient of a cochlear implant comprising:

a clinician subsystem having a clinician interface configured to receive one or more clinician inputs and, in response to the clinician inputs, at least one of select and customize a series of cochlear implant after-care tests; and

a recipient subsystem configured to receive the after-care tests from the clinician subsystem, and wherein the recipient subsystem is configured to communicate with the cochlear implant and to perform the series of after-care tests, substantially independent of the clinician subsystem, in response to a series of recipient inputs, to generate result data indicative of the result of the after-care tests for subsequent use by said clinician subsystem,

wherein the clinician subsystem is further configured to receive the result data from said recipient subsystem.

140. The system of claim 139, further comprising:

a device interface configured to communicatively couple said recipient subsystem and the cochlear implant.

141-143. (Cancelled)

144. The system of claim 139, wherein said clinician subsystem and said recipient subsystem are physically remote with respect to one another and communicate via the Internet.

145. The system of claim 139, wherein the cochlear implant is configured to store said series of after-care tests.

146. The system of claim 139, wherein the cochlear implant is configured to store said result data.

147-149 (Cancelled).

150. The system of claim 139, wherein the recipient subsystem is further configured to deliver the result data to the clinician subsystem, and further wherein the clinician subsystem is further configured to perform an assessment of the result data.

151-152. (Cancelled)

153. The system of claim 140, further comprising:

a cable coupled between said device interface and said cochlear implant.

154. (Cancelled)

155. The system of claim 139, wherein said clinician subsystem is configured to initiate the series of after-care tests performed by the recipient subsystem.

156. A method for performing after-care of a recipient of a cochlear implant comprising:

receiving one or more inputs at a clinician interface;

performing at least one of selection and customization of a series of cochlear implant after-care tests in response to the clinician inputs;

delivering said one or more after-care tests to a recipient subsystem;

performing the series after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem to generate result data indicative of the result of the after-care tests; and

delivering the result data to the clinician subsystem.

157. The method of claim 156, further comprising:

storing said one or more after-care tests in the cochlear implant.

158. The method of claim 156, further comprising:

storing said result data in the cochlear implant.

159. The method of claim 156, wherein the recipient subsystem further comprises a storage medium, and wherein the method further comprises:

storing said one or more after-care tests.

160-161. (Cancelled)

162. The method of claim 156, wherein said delivering said one or more after-care tests to the recipient subsystem comprises:

delivering said one or more after-care tests via the Internet.

163. (Cancelled)

164. The method of claim 156, wherein said performing said one or more after-care tests further comprises:

initializing the one or more tests being performed by the recipient subsystem with inputs received from the clinician interface.

165. A non-transitory computer readable medium comprising computer code instructions which, when executed by a computer system, implement a method of performing after-care of a recipient of a cochlear implant, the method comprising:

receiving one or more inputs at a clinician interface;

performing at least one of selection and customization of a series of cochlear implant after-care tests in response to the clinician inputs;

delivering said one or more after-care tests to a recipient subsystem comprising a recipient interface;

performing the series of after-care tests with the recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem to generate result data indicative of the result of the after-care tests; and

delivering the result data to the clinician subsystem.

166. The non-transitory computer readable medium of claim 165, wherein the method further comprises:

storing said one or more after-care tests in the cochlear implant.

167. The non-transitory computer readable medium of claim 165, wherein the method further comprises:

storing said result data in the cochlear implant.

168. The non-transitory computer readable medium of claim 165, wherein the recipient subsystem further comprises a storage medium, and wherein the method further comprises:

storing said one or more after-care tests in the recipient subsystem.

169-170. (Cancelled)

171. The non-transitory computer readable medium of claim 165, wherein said delivering said one or more after-care tests to the recipient subsystem comprises:

delivering said one or more after-care test via the Internet.

172. (Cancelled)

173. The non-transitory computer readable medium of claim 165, wherein said performing said one or more after-care tests further comprises:

initializing the one or more tests being performed by the recipient subsystem with inputs received from the clinician interface.

174. A system for performing after-care of a recipient of a cochlear implant comprising:

means for receiving one or more clinician inputs via a clinician subsystem;

means for selecting and customizing a series of cochlear implant after-care tests in response to the clinician inputs;

means for delivering said series of after-care tests to a recipient subsystem;

means for receiving recipient inputs via the recipient subsystem;

means for proceeding through the series of after-care tests with said recipient subsystem, in response to a series of recipient inputs, substantially independent of the clinician subsystem to generate result data indicative of the result of the after-care tests; and

means for delivering the result data to the clinician subsystem.

175. The system of claim 174, wherein the cochlear implant comprises means for storing said series of after-care tests.

176. The system of claim 174, wherein the cochlear implant comprises means for storing said result data.

177. The system of claim 139, wherein one of the series of cochlear implant after-care tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly.

178. The system of claim 179, wherein one of the series of after-care tests comprises a comparison of a measured neural response threshold to a previously measured neural response threshold.

179. The system of claim 177, wherein the cochlear implant comprises a plurality of electrodes, and wherein one of the series of after-care tests determines whether the dynamic range of each of the plurality of electrodes is set correctly.

180. The system of claim 139, wherein at least one of the series of after-care tests evaluates the effectiveness of the cochlear implant.

181. The method of claim 156, wherein at least one of the series of after-care tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly.

182. The method of claim 181, wherein the cochlear implant comprises a plurality of electrodes, and wherein at least a second one of the series of after-care tests is a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly.

183. The method of claim 182, wherein at least a third one of said after-care tests is a comparison of a measured neural response threshold to a previously measured neural response threshold.

184. The non-transitory computer readable medium of claim 165, wherein at least one of the series of cochlear implant tests is a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly.

185. The non-transitory computer readable medium of claim 184, wherein the cochlear implant comprises a plurality of electrodes, and wherein at least a second one of the series of after-care tests is a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly.

186. The system of claim 174, wherein the series of after-care tests includes a cochlear implant integrity check configured to determine whether one or more components of the cochlear implant are operating correctly.

187. The system of claim 186, wherein the cochlear implant comprises a plurality of electrodes, and wherein the series of after-care tests further includes a test that determines whether the dynamic range of each of the plurality of electrodes is set correctly.

EVIDENCE APPENDIX

None

RELATED PROCEEDINGS APPENDIX

None